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ORIGINAL

BEFORE THE ARIZONA CORPORATION COMMISSION

IN THE MATTER OF THE
APPLICATION OF ARIZONA-
AMERICAN WATER COMPANY, AN
ARIZONA CORPORATION, FOR A
DETERMINATION OF THE CURRENT
FAIR VALUE OF ITS UTILITY PLANT
AND PROPERTY AND FOR
INCREASES IN ITS RATES AND
CHARGES BASED THEREON FOR
UTILITY SERVICE BY ITS SUN CITY
WEST WATER AND WASTEWATER
DISTRICTS.

DOCKET NO. WS-01303A-02-0867

IN THE MATTER OF THE
APPLICATION OF ARIZONA-
AMERICAN WATER COMPANY, INC.,
AN ARIZONA CORPORATION, FOR A
DETERMINATION OF THE CURRENT
FAIR VALUE OF ITS UTILITY PLANT
AND PROPERTY AND FOR
INCREASES IN ITS RATES AND
CHARGES BASED THEREON FOR
UTILITY SERVICE BY ITS SUN CITY
WATER AND WASTEWATER
DISTRICTS.

DOCKET NO. WS-01303A-02-0868

IN THE MATTER OF THE
APPLICATION OF ARIZONA-
AMERICAN WATER COMPANY, AN
ARIZONA CORPORATION, FOR A
DETERMINATION OF THE CURRENT
FAIR VALUE OF ITS UTILITY PLANT
AND PROPERTY AND FOR
INCREASES IN ITS RATES AND
CHARGES BASED THEREON FOR
UTILITY SERVICE BY ITS MOHAVE
WATER AND HAVASU WATER
DISTRICTS.

DOCKET NO. W-01303A-02-0869

Arizona Corporation Commission
DOCKETED

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1 IN THE MATTER OF THE
2 APPLICATION OF ARIZONA-
3 AMERICAN WATER COMPANY, AN
4 ARIZONA CORPORATION, FOR A
5 DETERMINATION OF THE CURRENT
6 FAIR VALUE OF ITS UTILITY PLANT
7 AND PROPERTY AND FOR
INCREASES IN ITS RATES AND
CHARGES BASED THEREON FOR
UTILITY SERVICE BY ITS ANTHEM
WATER, AGUA FRIA WATER AND
ANTHEM/AGUA FRIA WASTEWATER
DISTRICTS.

DOCKET NO. WS-01303A-02-0870

8 IN THE MATTER OF THE
9 APPLICATION OF ARIZONA-
10 AMERICAN WATER COMPANY, AN
11 ARIZONA CORPORATION, FOR A
12 DETERMINATION OF THE CURRENT
13 FAIR VALUE OF ITS UTILITY PLANT
AND PROPERTY AND FOR
INCREASES IN ITS RATES AND
CHARGES BASED THEREON FOR
UTILITY SERVICE BY ITS TUBAC
WATER DISTRICT.

DOCKET NO. W-01303A-02-0908

**ARIZONA-AMERICAN WATER
COMPANY'S REPLY TO STAFF'S
STATEMENT OF OBJECTIONS TO
ARIZONA-AMERICAN WATER
COMPANY'S REBUTTAL
TESTIMONY**

14 Arizona-American Water Company ("Arizona-American") hereby submits its
15 response to Staff's Statement of Objections to Arizona-American Water Company's
16 Rebuttal Testimony ("Statement"). In the Statement, Staff objects to specified portions of
17 the rebuttal testimony offered by two Arizona-American expert witnesses on the ground
18 that it constitutes "'testimony' as to the interpretation of the Arizona Constitution and
19 cases interpreting it." Statement at 2. Staff argues that the Commission should give "no
20 weight" to this testimony because it is well-settled that expert testimony is impermissible
21 as to matters of domestic law. Id. Staff's objections should be overruled.

22 In this rate case, Arizona-American asserts that it is entitled to a just and
23 reasonable return on the fair value of its property devoted to public service under the
24 Arizona Constitution. The testimony Staff seeks to strike was offered explain how the fair
25 value of such property was determined. See Rebuttal Testimony of Thomas J. Bourassa at
26 9 ("appropriate to use the RCND [replacement cost new less depreciation] as the FVRB

1 [fair value rate base)].” Similarly, Dr. Zepp, the Company’s cost of equity expert,
2 testified that “use of an RCND rate base is appropriate and consistent with the ‘fair value’
3 concept.” Zepp Rebuttal at 30. In support of such testimony, Mr. Bourassa and Dr. Zepp
4 identify applicable legal authorities, which they understand to clarify the bases for their
5 recommendations. These are not legal opinions, nor are they intended to usurp the
6 province of the ALJ and the Commission to interpret the law and render the final decision.
7 Under such circumstances, there is no reason to strike the testimony, nor is it somehow
8 automatically inadmissible, as Staff’s recitation of federal law implies.

9 To begin with, there is no black line rule in Arizona against the admissibility of the
10 testimony at issue here, even if this were a civil judicial proceeding. In State v. Fendler,
11 127 Ariz. 464, 622 P.2d 23 (Ariz. App. 1980), the Court addressed the propriety of expert
12 testimony in a criminal tax evasion prosecution regarding the expert’s interpretation of
13 Arizona statutes, revenue rulings, and case law. The trial court excluded the expert’s
14 testimony—which was offered by the defendant in an attempt to establish that he lacked
15 intent to evade the payment of taxes—on the ground that the testimony concerned only
16 questions of law. Id. at 474, 33, n. 18. In reversing the trial court’s ruling, the Court of
17 Appeals agreed that it would be improper for a witness to “lecture the jury on the law of
18 the case,” but nonetheless held that the testimony was “clearly admissible for the limited
19 purpose of lending credence to appellant’s assertion that he never intended to evade the
20 payment of taxes.” Id. at 474, 33.

21 Moreover, each of the three federal cases Staff’s cites for the purportedly
22 unqualified rule that expert testimony is not permitted as to matters of domestic law
23 involved civil judicial proceedings. See Statement of Objections at 2 (citing Southern
24 Pine Helicopters, Inc. v. Phoenix Aviation Managers, Inc., 320 F.3d 838, 841 (8th Cir.
25 2003); Christiansen v. City of Tulsa, 332 F.3d 1270, 1283 (10th Cir. 2003); Aguilar v.
26 International Longshoreman’s Union Local #10, 966 F.2d 443, 447 (9th Cir. 1992)). The

1 reasons the federal courts preclude expert testimony in civil litigation are not present in
2 rate proceedings before the Arizona Corporation Commission.

3 For example, there is no concern that testimony as to legal matters or standards
4 may lead to confusion of the jury or otherwise invade its province. See, e.g., Karns v.
5 Emerson Elec. Co., 817 F.2d 1452, 1459 (10th Cir. 1987) (holding that although expert
6 testimony as to a legal standards is not inadmissible because it embraces an ultimate issue
7 to be decided by the trier of fact, such testimony may be excluded “for other reasons, such
8 as the likelihood of jury confusion.”); Benjamin J. Vernia, Annotation, *Admissibility of*
9 *Expert Testimony Regarding Questions of Domestic Law*, 66 A.L.R. 5th 135 (1999)
10 (noting that “many of the traditional bases for the rule relate to confusion of the jury”).
11 Obviously, such a rationale does not support application of the rule in the current
12 proceedings.

13 Another traditional basis for applying the rule against expert testimony as to legal
14 issues is that such testimony is inadmissible under Rule 702 of the Federal Rules of
15 Evidence. See, e.g., Aguilar, 966 F.2d at 447 (affirming district court’s exclusion of
16 testimony as to legal matters on the ground that it was “utterly unhelpful” under Rule
17 702). Rule 702, which is in pertinent part identical to Rule 702 of the Arizona Rules of
18 Evidence, provides that expert testimony is admissible only if “scientific technical, or
19 other specialized knowledge will assist the trier of fact to understand the evidence or to
20 determine a fact in issue.”

21 Rule 702 need not be blindly applied here either. A.R.S. § 40-243(A) provides that
22 in hearings before the Commission, “[n]either the commission nor a commissioner shall
23 be bound by technical rules of evidence.” A.A.C. R14-3-109(K) provides that, although
24 the Rules of Evidence “will be generally followed,” the Rule also states that they may be
25 “relaxed in the discretion of the Commission” when deviation from the rules “will aid in
26 ascertaining the facts.” Accordingly, even if it were determined that the rule announced in

1 Staff's cited cases applied with equal force to the testimony here, the Commission should
2 nonetheless exercise its broad discretion to consider the testimony on the ground that it is
3 helpful in understanding the bases for Arizona-American's witnesses' testimony
4 concerning the propriety of employing the Reconstruction Cost New Less Depreciation or
5 RCND rate base as Arizona-American's Fair Value Rate Base. From there, the ALJ and
6 Commission are free to give such testimony its due weight.

7 Based on the foregoing, Arizona-American respectfully requests that the
8 Commission overrule Staff's objections.

9 DATED this 17th day of November, 2003.

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12 By _____

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Company

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14
15 An original and 21 copies of the
16 foregoing, and attached documents
were delivered this 17th day of
November, 2003, to:

17 Docketing Supervisor
18 Docket Control
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1200 West Washington
Phoenix, AZ 85007

20 A copy of the foregoing, hand-
21 delivered this 17th day of
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